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In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

In our opening brief, we urged that the Interstate Commerce Commission's approval of trackage rights granted to the Missouri-Kansas-Texas (MKT) and Denver & Rio Grande Western (DRGW) railroad companies, in connection with the Commission's approval of a major rail consolidation,[1] exempts those carriers from provisions of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, that would pose obstacles to the implementation of the approved transactions. We demonstrated that the plain language of the Interstate Commerce Act's (ICA's) statutory exemption provision, 49 U.S.C. 11341(a), sup-

[1] See *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982).

ports the Commission's interpretation (Gov't Br. 23-28). We also demonstrated that the Commission's interpretation is consistent with the structure and purposes of the ICA's consolidation provisions (*id.* at 28-35) and with six decades of agency and court interpretation of the statute (*id.* at 36-42). We explained that the contrary view taken by the court of appeals reflects a serious misunderstanding of the role of the Commission in approving carrier-negotiated transactions (*id.* at 32-34) and would seriously impede the implementation of Commission-approved transactions (*id.* at 42-47). Respondent unions, Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU), have largely failed to answer our arguments. Instead, they devote much of their energy to issues raised in their pending cross-petitions, obscuring the central issue in this case.

1. The issue in this case is the meaning of Section 11341(a), which exempts a party to a Commission-approved transaction from "all other law * * * as necessary to let that person carry out the transaction." We submit that once the Commission (and the reviewing courts) approve a transaction as consistent with the ICA's congressionally specified public interest standards,[2] Section 11341(a), by its own force, exempts the party implementing the transaction from other laws that conflict with the terms of the transaction. The unions, on the other hand, maintain that the Commission, rather than Section 11341(a), provides the exemption (UTU Br. 16) and that the Commission, even after it has approved a transaction as consistent with the public interest, must "examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished" (*id.* at 26).

[2] Section 11344(b)(1) of the ICA requires that the Commission consider various "public interest" factors, including the transaction's effect on competition and the interests of carrier employees (49 U.S.C. 11344(b)(1)).

a. The unions offer little response to the Commission's submission that the plain language of Section 11341(a) demonstrates that the provision is self-executing (Gov't Br. 23-28). They cite plain language principles (UTU Br. 18-19; BLE Br. 23) but fail to point to any language in Section 11341(a) that requires the Commission to conduct the necessity analysis that they envision. BLE opaquely observes that "[t]he exemption contained in section 11341 is not as broad as asserted by the [Commission] but only extends by its terms to those exclusions 'necessary to let that person carry out the [approved or exempted] transaction' " (Br. 37, quoting 49 U.S.C. 11341(a)). UTU states that the Commission's interpretation "effectively writes the necessity component out of the law" (Br. 20). The Commission's interpretation, however, is faithful to, and indeed mandated by, the statutory language.

Section 11341(a) does *not* state—as the unions would have it—that the Commission may exempt participants from other laws to the extent that the Commission determines that the particular transaction terms are "necessary" to the overall success of the transaction. Instead, the statute provides, in self-executing form, that a participant in an approved transaction "*is exempt*" from "other law * * * as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a) (emphasis added)). The question is not whether particular transaction terms are, in the Commission's articulated judgment, "necessary." The question is whether, given the transaction negotiated by the parties and approved by the Commission, an *exemption* from other laws is "necessary" to allow the transaction to be implemented in accordance with its terms. If so, then *the statute* confers the necessary exemption. The Commission's adherence to Section 11341(a)'s unambiguous language does not "write[] the necessity component out of the law." Instead, it recognizes that Section 11341(a) defines the scope of the exemption by the terms of the approved transaction.

b. The unions offer no response to our submission (Gov't Br. 20, 28-35) that the Commission's interpretation is consistent with two central purposes of the ICA's consolidation provisions: first, to leave to the carriers themselves the task of formulating transactions; and second, to expedite transactions that are in the public interest by replacing the complex web of potentially applicable federal, state, and local law with a single Commission proceeding, involving all interested parties, where the proposal can be evaluated in its entirety under congressionally specified criteria. The unions, limiting their focus to the question of labor relations, seemingly overlook the fact that Congress has instructed the Commission to implement a national transportation policy that, in turn, requires consideration of competition and economic efficiency issues as well as labor protection. See 49 U.S.C. 10101a(2).

c. The unions' principal argument on this point is that the Commission's interpretation of Section 11341(a) is inconsistent with a Fifth Circuit decision, *City of Palestine* v. *United States*, 559 F.2d 408 (1977), cert. denied, 435 U.S. 950 (1978). See UTU Br. 26-29; BLE Br. 38-39. However, that case has little relevance here. As we explained in our opening brief (at 41 n.26), *City of Palestine* held that the Commission exceeded the scope of its transaction approval authority when it purported to void a contract that was "not germane" to the merger transaction (559 F.2d at 414).[3] But the court expressly recog-

[3] In that case, the Commission granted a merging railroad's request that it be relieved of a burdensome agreement with the City of Palestine, requiring that a certain percentage of the railroad's operations take place in that city. The court reversed the Commission, explaining (559 F.2d at 414):

> The Palestine Agreement has no role in the [Commission's] analysis of the proposed voluntary merger * * *. Despite the irrelevance of the Palestine Agreement to the merger, the [Com-

nized that it was dealing with the scope of the Commission's transaction approval authority, not with the meaning of Section 11341(a) as applied to terms that are plainly part of what the Commission is authorized to approve. See 559 F.2d at 414. Two other factors further distinguish the present case from *City of Palestine*. First, the unions here failed to raise any "germaneness" objection to the challenged transaction terms during the Commission's approval proceedings.[4] Second, there is no serious dispute

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> mission] has gratuitously relieved [the railroad] of its contractual obligations. We cannot countenance that action.

Thus, that case turned on the fact that the contractual obligation was irrelevant to the transaction at issue.

We note that the Commission here, through its labor protective provisions, has required each railroad to protect the collectively bargained rights of its employees who are affected by the transaction. Contrary to UTU's suggestion (UTU Br. 10), the Missouri Pacific Railroad Company (MP) has never denied its obligation to negotiate an implementing agreement with its employees governing any required rearrangement of MP forces resulting from MKT's and DRGW's trackage rights operations. And, as UTU acknowledges (*id.* at 11 n.9), MKT has negotiated new collective bargaining agreements with its employees governing its trackage rights operations. See MKT Br. 7-9.

[4] Interested parties are generally expected to challenge the germaneness of transaction terms during the Commission's transaction approval process. That is exactly what the City of Palestine did (see 559 F.2d at 412) and what the unions failed to do here. The unions participated in the Commission's consolidation proceedings, were fully aware that MKT and DRGW had requested trackage rights reserving the rights to use their own crews, but failed to object to the railroads' crewing terms (Gov't Br. 7-9, 43-45; MKT Br. 3-7). The unions never suggested that Commission approval of MKT's and DRGW's proposals would conflict with employee rights under the RLA or under existing collective bargaining agreements (see Pet. App. 58a-62a).

The unions contend that their failure to raise timely objections is excusable because they thought that the Commission's labor protective provisions would negate crewing terms of the proposed trackage rights agreements (UTU Br. 21-22; BLE Br. 27 n.13). That contention

that the crewing provisions at issue *are* germane terms of the trackage rights transactions.[5]

City of Palestine simply does not reach the central issue here: whether Section 11341(a) is self-executing. Contrary to the unions' contentions, the Commission's interpretation of Section 11341(a) is fully consistent with judicial and agency precedent. As we noted in our opening brief (at 36-39), the Eighth Circuit has expressly recognized that Section 11341(a) is self-executing. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432, cert. denied, 375 U.S. 819 (1963). The First Circuit recently acknowledged the "self-executing nature of § 11341(a)" as well. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 801 (1986), cert. denied, No. 85-2153 (Oct. 6, 1986). And the Commission has consistently adhered to that position for nearly 30 years. See Pet. App. 67a; *Railway Express*

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strains credulity. The Commission has *never* interpreted its labor protective provisions as negating the right of a railroad, granted trackage rights in a consolidation, to crew its own trains. The railroads' specific reservation of crewing rights in their proposed trackage rights agreements certainly should have put the unions on notice of the need to challenge that provision or run the risk that their objections would be time-barred. See, *e.g.*, *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985).

[5] The Commission required MP to give MKT and DRGW trackage rights over MP lines for the specific purpose of ensuring that those railroads could remain in competition with MP. If, as the unions now urge, the MP employees were to control the crewing decisions of the tenant railroads, the effectiveness of those trackage rights could be jeopardized. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (Pet. App. 39a (emphasis in original)). The majority did not conclude otherwise. See Pet. App. 45a.

Agency, Inc., Notes, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681 (1970); *Texas Turnpike Authority Abandonment By St. Louis S.W. Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958). The Commission's longstanding and judicially affirmed interpretation should be respected. See, *e.g.*, *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 634 (1984).

d. The unions fail to address the practical consequences of their interpretation of Section 11341(a). As we explained in our opening brief (at 32-34, 42-46), the unions would require that the Commission determine which of the terms of a privately negotiated transaction are "necessary" terms and then require that the Commission, rather than the interested parties, anticipate and identify potential legal obstacles to carrying out those terms. The unions would then permit interested parties to thwart Commission-approved transactions by raising post-approval legal challenges to transactions that have been reviewed and found consistent with the public interest. In the present case, the unions' protracted litigation has imposed considerable burdens on the implementation of a trackage rights transaction that the Commission not only approved but required as a condition to a major rail consolidation. The record in this case demonstrates how the unions' position would impede effectuation of the Nation's rail transportation policy.

2. The unions devote much of their argument to the broad questions presented in their pending cross-petitions (85-983 Pet.; 85-997 Pet.) rather than to the specific and quite different question presented by the petitions for certiorari. They maintain, in essence, that they have a contractual agreement with the Missouri Pacific Railroad Company (MP) entitling them to bargain over crewing of

MKT and DRGW trains and that the Commission lacked power to take away their rights under the agreement with MP (BLE Br. 28-34, 43-47; UTU Br. 31-50). Those contentions are not responsive to the question presented in the petitions and are, in any event, mistaken.

a. The unions asserted in the proceedings below that they have an established right, as representatives of MP employees, to negotiate with MKT and DRGW concerning the crewing of the MKT and DRGW trackage rights operations, and that those operations could not be commenced until a new collective bargaining agreement had been negotiated in accordance with the RLA. They specifically contended that (1) the issue of what crews would operate MKT and DRGW trains operating over MP tracks must be settled through the RLA's major dispute provisions; and (2) the ICA's labor protective provisions, 49 U.S.C. (Supp. II) 11347, and the labor protective conditions imposed by the Commission thereunder prohibited MKT and DRGW from unilaterally deciding to use their own crews.

The Commission rejected those contentions (Pet. App. 58a-60a, 65a). The court of appeals, however, did not address them; instead, it instructed the Commission to "explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction" (Pet. App. 45a). The court, by characterizing the unions' purported right to "cross-bargain" with a competing railroad as an "asserted right" (*ibid.*), plainly declined to determine whether the right even exists. And the court, by requiring a remand to the Commission, intimated—but did not expressly decide—that the Commission does have power to approve transactions that specify crewing arrangements. In sum, the only question squarely decided by the court of appeals is the question presented in the peti-

tions for certiorari, *i.e.*, whether the Commission's action was sufficient to exempt the crewing terms from any collective bargaining process required by the RLA, not the question presented in the unions' cross petitions, whether the unions had an established right to cross bargain that could not be eliminated by *any* Commission action. If the Court wishes, however, to address the unions' arguments, we would take issue with their position.

b. First, on the record in this case, the unions' purported cross-carrier bargaining rights simply do not exist. The Commission found the unions' claim to those rights "unpersuasive and unsupported by the record" (Pet. App. 58a-59a, 65a). And Judge MacKinnon rejected the unions' cross-bargaining contentions, stating "[t]here is no basis in law or fact for such an absurd conclusion" (*id.* at 29a). The unions, even in this Court, have failed to identify the source of these asserted rights, arguing instead that the Commission "must assume that rail labor had such a right" (UTU Br. 25 n.13).[6]

But even if the unions had such cross-carrier bargaining rights, the unions are mistaken in contending that the Commission has no authority to approve a transaction term that affects such rights. As MKT persuasively explains (Br. 19-35), Congress has recognized that rail consolidation will necessarily affect rail employees' collectively bargained rights. The ICA accordingly instructs the

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[6] The unions have never identified any provision of a collective bargaining agreement that provides them with cross-carrier bargaining rights. And UTU, acknowledging the D.C. Circuit's decision in *Central Vermont Ry.* v. *Brotherhood of Maintenance of Way Employees*, 793 F.2d 1298 (1986), now concedes that such cross-carrier bargaining rights do not exist under the RLA (UTU Br. 43 n.23). UTU instead insists (without any citation of authority) that such rights somehow spontaneously spring into existence through the Commission's labor protective conditions (*ibid.*).

Commission to consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandates labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). These provisions exist precisely because adjustments of working conditions inevitably accompany rail consolidations and related transactions. The courts have repeatedly recognized the Commission's power to prescribe methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d at 800; *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d at 430-431.

The unions' claims are particularly far-fetched under the facts of this case. The unions essentially contend that a private agreement between *MP and its employees,* which supposedly creates "cross-carrier" bargaining rights, disables the Commission from imposing, on a merger initiated by MP, conditions designed to protect the public interest in competition.[7]

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[7] The unions mistakenly contend that the Commission's authority is limited to supplementing rail labor's rights (UTU Br. 37-38), stating that "[e]mployee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads" (*id.* at 38). That reasoning directly conflicts with this Court's observation that the purpose of the ICA's labor

The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction. The amicus curiae brief of the Association of American Railroads and National Railway Labor Conference discusses this matter

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protective provisions is "to provide compensatory conditions" for rail employees adversely affected by rail consolidations. *Norfolk & W. R.R.* v. *Nemitz*, 404 U.S. 37, 42 (1971).

The unions also place mistaken reliance (UTU Br. 40-41) on a prior Commission decision, *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967). In *Southern*, the Commission determined that a rail carrier, consolidating operations through a Commission approved transaction, remained subject to the requirements of the Washington Job Protection Agreement (see Gov't Br. 5 n.3) and various collective bargaining agreements. However, the Commission noted that it had previously imposed those requirements as conditions of the transaction. (331 I.C.C. at 168 ("[W]e made it clear that the obligations of the collective bargaining agreements which, parenthetically, includes the Washington Agreement, should be observed in carrying out the consolidations proposed.")). There is nothing unusual in this practice. See *Norfolk & W. R.R.*, 404 U.S. at 43. Furthermore, the *Southern* decision specifically observed that the Commission's labor protective conditions supplant the RLA dispute resolution procedures (331 I.C.C. at 171). The *Southern* decision does contain dictum concerning the "independent nature of those rights" given by the Washington Agreement (*id.* at 169). However, the Commission has determined that this dictum "was not reflected in the future course of labor history and will not be followed today." See *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific, Ltd. & Springfield Terminal Ry.—Exemption From 49 U.S.C. 11342 & 11343*, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985) (*reprinted in* 85-792 Pet. Addendum B at 48a n.9), appeal pending, No. 85-1636 (D.C. Cir.).

at some length (Br. 24-30). We simply add that the Commission's position is entitled to considerable deference since it represents the Commission's construction of its own regulations under a statute it is charged with enforcing. See *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558 (1958); see also *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. at 634.

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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